



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9609-6]

Notice of a Regional Project Waiver of Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Sussex County, DE

SUMMARY: The EPA is hereby granting a waiver of the Buy American Requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to Sussex County, DE (“County”), for the purchase of one ductless split heating/air conditioning (HVAC) system, manufactured in Japan by Fujitsu General American, Inc. This is a project specific waiver and only applies to the use of the specified product for the ARRA project being proposed. Any other ARRA recipient that wishes to use the same product must apply for a separate waiver based on project specific circumstances. The County evaluated two different manufacturers of the specified ductless split air conditioning and heat pump systems. The ARRA funded project is for construction of the Town of Millsboro, Oak Orchard Sanitary Sewer District Expansion Area 1, Pump Station No. 326 with a ductless split HVAC system. Based upon information submitted by the County and its consulting engineer, EPA has concluded that there are no HVAC systems manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet the technical specifications and that a waiver of the Buy American provisions is justified. The Regional Administrator is making this determination based on the review and

recommendations of the EPA Region III, Water Protection Division, Office of Infrastructure and Assistance.

The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to the requirements of Section 1605(a) of ARRA. This action permits the purchase of a ductless split HVAC system for the proposed project being implemented by Sussex County.

EFFECTIVE DATE: [insert date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Robert Chominski, Deputy Associate Director, (215) 814-2162, or David McAdams, Environmental Engineer, (215) 814-5764, Office of Infrastructure & Assistance (OIA), Water Protection Division, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

SUPPLEMENTARY INFORMATION:

In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111-5, Buy American requirements, to Sussex County, Delaware for the purchase of one ductless split heating/air conditioning system (HVAC) for Pump Station No. 326. EPA has evaluated the County's basis for procuring the HVAC system for the pump station. The ARRA funded project is for a pump station (PS No. 326) with a HVAC system. The construction of the pump station number 326 includes a heat pump system for the electrical room. The system includes an indoor wall mounted evaporator-fan unit and an outdoor aired cooled compressor-condenser. The new HVAC split system will provide benefits to the County due to the product's reliability with the electronics controlling

critical infrastructure, cost effectiveness, energy efficiency, and ease of maintenance.

The HVAC system is specifically designed for this project to provide heat and cooling in the pump station's electrical room. Based upon information submitted by the County and its consulting engineer, EPA has concluded that there are no HVAC systems manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet the technical specifications for the County to pursue the purchase of domestically manufactured HVAC systems.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or a public works project unless all of the iron, steel, and manufactured goods used in the project is produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here the EPA. A waiver may be provided under Section 1605(b) if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

EPA has also evaluated the County's request to determine if its submission is considered late or if it could be considered as if it was timely filed, as per the OMB Guidance at 2 CFR 176.120. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as

“late” if submitted after the contract date. However EPA could also determine that a request be evaluated as timely, though made after the date that the contract was signed, if the need for a waiver was not reasonably foreseeable. If the need for a waiver is reasonably foreseeable, then EPA could still apply discretion in these late cases as per the OMB guidance, which says “the award official may deny the request”. For those waiver requests that do not have a reasonably unforeseeable basis for lateness, but for which the waiver basis is valid and there is no apparent gain by the ARRA recipient or loss on behalf of the government, then EPA will still consider granting a waiver.

In this case, there are no U.S. manufacturers that meet the County’s project specifications for the HVAC system. The waiver request was submitted after the contract date because the County was not notified that a Buy American waiver was needed, and that there are no American manufacturers of the HVAC system that could meet the project specifications, until their contractor submitted their shop drawings on August 1, 2011. Therefore, the County did not submit a waiver request until September 22, 2011. There is no indication that the County failed to request a waiver to avoid the requirements of the ARRA, particularly since there are no domestically manufactured products that meet the project specifications. EPA will consider the County’s waiver request, a foreseeable late request, as though it had been timely made since there is no gain by the County and no loss by the government due to the late request.

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of P.L. 111-5, the “American Recovery and Reinvestment Act of 2009”, defines reasonably available quantity as “the quantity of iron, steel, or relevant manufactured

good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.” The County has provided information to the EPA representing that there are currently no domestic manufacturers of the HVAC systems that meet the project specification requirements. Based on additional research by EPA’s consulting contractor and to the best of the Region’s knowledge at this time, there does not appear to be any other manufacturer capable of meeting the County’s specifications.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are “shovel ready” by requiring utilities, such as the County, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the “shovel ready” status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

The OIA has reviewed this waiver request and to the best of our knowledge at the time of review has determined that the supporting documentation provided by the County is sufficient to meet the criteria listed under Section 1605(b) and in the April 28, 2009, “Implementation of Buy American provisions of P.L. 111-5, the ‘American Recovery and Reinvestment Act of 2009’ Memorandum:” Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in Section 1605(b)(2). Due to the lack of production of this product in the United States in

sufficient and reasonably available quantities and of a satisfactory quality to meet the County's technical specifications, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, Sussex County is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111-5 for the purchase of a ductless split HVAC system using ARRA funds as specified in Sussex County's request of September 22, 2011. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers "based on a finding under subsection (b)."

Authority: Pub. L. 111-5, section 1605.

Issued on: December 13, 2011.

James W. Newsom, Acting Regional Administrator,
U.S. Environmental Protection Agency, Region III.

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